

JESSE H. KNIGHT

IBLA 80-563

Decided March 24, 1981

Appeal from decision of the Utah State Office, Bureau of Land Management, rejecting preference right coal lease applications U-0149348, U-0149349, and U-0149368.

Vacated and remanded.

1. Administrative Procedure: Adjudication -- Application and entries:
Valid Existing Rights -- Coal Leases and Permits: Generally --
Regulations: Applicability

Where the holder of a coal prospecting permit completes his exploration and applies for a preference right coal lease in 1971, the application must be adjudicated on the basis of the applicant's subsequent conformity with regulations, amended in 1976 and 1979, with retroactive effect.

2. Administrative Procedure: Hearings -- Coal Leases and Permits:
Generally -- Coal Leases and Permits: Leases -- Coal Leases and
Permits: Permits -- Rules of Practice: Hearings

A coal prospecting permittee who applies for a coal lease is entitled to a hearing before an Administrative Law Judge before his application is rejected, where the permittee alleges that the application contains data that commercial quantities of coal exist on the lands; however, where the permittee alleges that there is

coal in commercial quantities in certain lands as measured by the mining industry standard BLM and Survey should have the opportunity to consider whether commercial quantities as measured by the mining industry is sufficient to comply with commercial quantities as defined in 43 CFR 3430.1-2.

APPEARANCES: Ellen Maycock, Esq., Salt Lake City, Utah, for appellant; Carol A. Baca, Esq., Office of the Solicitor, Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

This appeal is taken from a decision dated March 7, 1971, by the Utah State Office, Bureau of Land Management (BLM), rejecting appellant's preference right coal lease applications pursuant to 43 CFR 3430.5-1(a)(1). That regulation directs the rejection of an application where an applicant has failed to show that coal exists in commercial quantities on the applied for lands.

The following facts are not in dispute. On April 30, 1971, appellant filed the preference right lease applications (applications) here at issue. On February 23, 1972, the Director, Geological Survey (Survey), sent a memorandum to the Utah State Office advising BLM that commercial quantities of coal had been found on U-0149348 and U-0149349 and on a portion of U-0149368. On September 12, 1972, the Utah State Director advised BLM that he had prepared a draft decision rejecting the lease application on U-149368 in part but granting the applications for U-0149348 and U-0149349 in their entirety. This proposed BLM decision was never issued. On January 15, 1973, the Associate Director, BLM, informed the Utah State Director that no further actions should be taken on the applications pending further instructions.

The imposition of a Secretarial moratorium on the issuance of coal leases and permits caused BLM to suspend action on the adjudication of appellant's applications. See Krueger v. Morton, 539 F.2d 235 (D.C. Cir. 1976); Hunter v. Morton, 529 F.2d 645 (10th Cir. 1976). While the applications were pending, Congress enacted the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 90 Stat. 1083, 30 U.S.C. § 201(b) (1976). Meanwhile, on May 7, 1976, the Department revised its regulations relating to coal leasing and in 43 CFR 3520.1-1(c) defined commercial quantities as follows:

A permittee has discovered commercial quantities of coal or a valuable deposit of one of the other permit minerals

if the mineral deposit discovered under the permit is of such a character and quantity that a prudent person would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. The permittee must present sufficient evidence to show that there is a reasonable expectation that his revenues from the sale of the mineral will exceed his costs of developing the mine, and extracting, removing, and marketing the mineral.

Under 43 CFR 3520.1-1(d) (1976), this standard was made applicable to lease applications pending on the effective date of the regulation. 43 CFR 3521.1-1(b) (1976), governing "initial showing," required preference right applicants to support their applications with more detailed data than had been required when appellant's applications were filed in 1971.

On July 14, 1976, appellant was granted a 1-year extension (to July 6, 1977) in which to submit the additional information required by the initial showing provisions of the revised regulations. On October 3, 1977, BLM required appellant to submit within 120 days "a certified abstract from a qualified abstractor, as to the presence of any mining claims (located prior to the date of issuance of the permit), embracing all or a part of the public land area * * * under application for preference right lease." The time allowed for submission of said abstract was extended by notice dated January 16, 1978, and appellant filed an abstract on March 3, 1978.

By decision dated February 7, 1979, BLM determined that the appellant failed to submit the "initial showing information" required by 43 CFR 3521.1-1(b) (1976) within the time allowed. BLM further determined that the information previously filed did not comply with the regulations. Accordingly, BLM again requested that appellant submit the required information and granted a 60-day extension for appellant to comply. Appellant submitted the initial showing report on April 26, 1979.

On July 19, 1979, new regulations were published which again revised the prudent person/commercial quantities definitions. Thus, section 3430.1-2 provides:

(a) The coal deposit discovered under the prospecting permit shall be of such character and quantity that a prudent person would be justified in further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine.

(b) The applicant shall present sufficient evidence to show that there is a reasonable expectation that revenues from the sale of the coal shall exceed the cost of developing the mine and extracting, removing, transporting, and marketing the coal. The costs of development shall include the estimated cost of exercising environmental protection measures and suitably reclaiming the lands and comply with all applicable Federal and State laws and regulations.

Based on Survey's conclusion that appellant's initial showing failed to meet the requirements of the regulations, BLM's March 7, 1980, decision, appealed herein, states:

Although drillhole information indicates the possibility of at least one coal bed that could contain commercial quantities of coal, additional information would be needed to establish the continuity of at least one bed of minable thickness. No measured or indicated reserves can be determined from the information submitted.

Appellant has requested a hearing to prove that commercial quantities of coal exist on the lands covered by the applications. In connection with this request appellant states that he would be prepared to present testimony of persons experienced in the mining industry to indicate that a prudent person with experience in the mining industry would mine the coal deposits contained on the subject lands on the basis of the information submitted in support of appellant's applications.

Appellant also asserts that rejection of his applications was arbitrary, capricious, an abuse of discretion, and violative of the Mineral Leasing Act, 30 U.S.C. § 201(b) (1976). More particularly, appellant refers to the 1972 determination by Survey that coal in commercial quantities existed on the lands covered by the applications. Appellant objects to the retroactive application of the revised applications to his initial showing. Finally, appellant asserts that BLM delayed unreasonably in processing his applications, that he justifiably relied on regulations in effect at pertinent times, and that the Secretary should be estopped from refusing to issue the leases.

[1] Several of the issues raised by appellant have been considered and disposed of in previous cases. Thus, appellant's lease applications, filed in 1971, must be adjudicated on the basis of conformity with regulations as revised in 1976 and 1979, with retroactive effect. Kin-Ark Corp., 45 IBLA 159 (1980). Utah International, Inc. v. Andrus, 488 F. Supp 962 (D. Utah 1979). Kin-Ark, supra, contains a thorough discussion of this point.

Second, appellant is not aided by Survey's 1972 determination that coal in commercial quantities existed on the subject lands. As hereinbefore indicated, that standard was modified. In any case, although a Survey recommendation is critical, BLM must issue a formal decision which either grants or denies the lease. Utah International v. Andrus, 488 F. Supp. 976 (D. Colo. 1980) (appeal pending).

Appellant's contentions concerning delay and estoppel are not persuasive. As succinctly pointed out in Utah, supra (D. Utah), the chief elements contributing to the long delays in BLM's processing of preference right coal lease applications were the moratorium on coal leasing, the development of heightened environmental concerns and litigations, and the reformulation of coal leasing policies in the years since appellant's applications were filed. Under these circumstances and a similar fact pattern, arguments as to unreasonable delay were found to be without merit by the Utah district court. As to estoppel, appellant has made no effort to show how the individual elements of that extraordinary remedy are apropos here. It must be noted that appellant was on constructive notice of the 1976 regulations whose applicability to preference right lease applications was addressed directly and specifically at 41 FR 18845 (May 7, 1976). See also Kin-Ark, supra.

[2] Under 43 CFR 3430.5-2(b) an applicant has the right to a hearing before an Administrative Law Judge if he alleges that the facts in his application are sufficient to show entitlement to a lease. Such entitlement would be based on a showing consistent with 43 CFR 3430.1-1, that appellant has discovered commercial quantities of coal on the prospecting permit lands as defined by 43 CFR 3430.1-2. On appeal appellant contends that facts stated in the application show that commercial quantities of coal exist on the land as measured by the mining industry standards (Appellant's statement of reasons), and that he is prepared to present evidence that by the standards of the mining industry, a prudent person would be justified in expending labor and means to work the coal deposits on the subject lands (Appellant's response to brief of respondent BLM). Appellant has not indicated that the alleged mining industry standard is sufficient to comply with commercial quantities as defined in 43 CFR 3430.1-2. For this reason the request for a hearing before an Administrative Law Judge is denied.

Accordingly, the case will be remanded to the State Office to give BLM and Survey the opportunity to consider appellant's evidence that commercial quantities of coal, as measured by the mining industry standards, do exist on the subject lands and that the quantity is sufficient to comply with commercial quantities defined in 43 CFR 3430.1-2.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded to BLM for further action consistent herewith.

Gail M. Frazier
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Douglas E. Henriques
Administrative Judge

